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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1025~~ 70-45

UNITED STATES OF AMERICA,

Appellant,

v.

DANIEL B. BREWSTER,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM

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Table of Contents

	PAGE
Statement	2
Questions Presented	4
Argument:	
I. The Criminal Appeals Act, 18 U.S.C. §3731, does not confer jurisdiction over this direct criminal appeal	4
A. The decision below was not based upon the invalidity or construction of the statute upon which the indictment was founded	6
B. The decision below was not one sustaining a motion in bar	8
II. The question sought to be presented on this direct appeal is beyond the scope of this Court's review	12
III. The question sought to be presented on this direct appeal was not expressly passed on below and is not ripe for review by this Court	13
IV. The decision below raises no substantial question not previously decided by this Court	15
V. The question sought to be presented on this appeal is so insubstantial as not to need further argument	21
Conclusion	25
Appendix E	27

Table of Citations

Cases

Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936)	14
Carroll v. United States, 354 U.S. 394 (1957)	5, 8, 9, 10, 12
Coffin v. Coffin, 4 Mass. 1 (1808)	19-20
Dombrowski v. Eastland, 387 U.S. 82 (1967)	7, 18, 21

	PAGE
Kilbourn v. Thompson, 103 U.S. 168 (1880)	16, 20
Moore v. Mississippi, 21 Wall. 636 (1875)	11
Parks v. United States, 355 F. 2d 167 (5th Cir. 1965)	24
Powell v. McCormack, 395 U.S. 486 (1969)	7, 17-19, 21
Sorrells v. United States, 287 U.S. 435 (1932)	11
State v. Linden, 154 La. 65 (1923)	11
Tenney v. Brandhove, 341 U.S. 367 (1951)	16, 20, 25
United Public Workers of America v. Mitchell, 330 U.S. 74 (1947)	14
United States v. Blue, 384 U.S. 251 (1966)	9
United States v. Borden, 308 U.S. 188 (1939)	5, 6, 8, 13
United States v. Carter, 231 U.S. 492 (1913)	8, 14
United States v. Cook, 17 Wall. 168 (1872)	10
United States v. Covington, 395 U.S. 57 (1969)	9
United States v. Fabrizio, 385 U.S. 263 (1966)	6
United States v. Fruehauf, 365 U.S. 146 (1961)	14-15
United States v. Glazer, 129 F. Supp. 285 (D. Del. 1955)	23
United States v. Guest, 383 U.S. 745 (1966)	6
United States v. Halsey, Stuart, 296 U.S. 451 (1935)	10
United States v. Hark, 320 U.S. 531 (1944)	6, 9
United States v. Hastings, 296 U.S. 188 (1935)	8
United States v. Johnson, 383 U.S. 169 (1966)	3, 7, 11-13, 14, 15-23
United States v. Keitel, 211 U.S. 370 (1908)	13
United States v. Kemmel, 188 F. Supp. 736 (M.D. Pa. 1960)	24
United States v. Kissel, 218 U.S. 370 (1910)	13
United States v. Laub, 385 U.S. 475 (1967)	6
United States v. Mason, 213 U.S. 115 (1909)	13
United States v. Mersky, 361 U.S. 431 (1960)	9, 10
United States v. Murdock, 284 U.S. 141 (1931)	9, 11
United States v. Petrillo, 332 U.S. 1 (1947)	6
United States v. Shirey, 359 U.S. 255 (1959)	7

	PAGE
United States v. Sisson, 399 U.S. 267 (1970)	5-6, 8, 9-12
United States v. Spector, 343 U.S. 169 (1952)	6
United States v. Storrs, 272 U.S. 652 (1926)	10
United States v. Weller, No. 77, this Term	5, 10, 12, 25
Wason, Ex parte, 4 Q.B. 573 (1869)	19
Will v. United States, 389 U.S. 90 (1967)	9
Wilson v. United States, 230 F. 2d 521 (4th Cir.), cert. denied 351 U.S. 931 (1956)	24

Constitution and Statutes

United States Constitution:	
Article I, Section 6	2, 4, 6, 7, 9, 11-12, 13, 15-22
Fifth Amendment	9
Criminal Appeals Act, 18 U.S.C. §3731	4-6, 8-12, 13, 14, 15
Federal Bribery Statute, 18 U.S.C. §201	2, 4, 6, 12, 13-14, 18, 21-25
18 U.S.C. §203	23

Miscellaneous

Stern & Gressman, Supreme Court Practice (4th ed. 1969)	13
Note, *The Bribed Congressman's Immunity From Prosecution*, 75 YALE L.J. 335 (1965)	22-23
House Rep. 748, Comm. on the Judiciary, 87th Cong., 1st Session	25

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UNITED STATES OF AMERICA,

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v.

DANIEL B. BREWSTER,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm without further argument the judgment of the United States District Court for the District of Columbia on the following grounds:

1. The Criminal Appeals Act, 18 U.S.C. §3731, does not confer jurisdiction over this direct criminal appeal.

2. The question sought to be presented on this direct appeal is beyond the scope of this Court's review.

3. The question sought to be presented on this direct appeal was not expressly passed on below and is not ripe for review by this Court.

4. The decision below raises no substantial question not previously decided by this Court.

5. The question sought to be presented on this appeal is so insubstantial as not to need further argument.

STATEMENT

Because the Government mistakenly characterizes the decision below as one "based upon the invalidity of the statute upon which the indictment is founded," the summary of the case set forth in its Jurisdictional Statement requires some amplification.

On October 9, 1970, the United States District Court for the District of Columbia orally dismissed certain counts of an indictment charging appellee, a former United States Senator, with soliciting and receiving bribes from Cyrus T. Anderson, a lobbying representative of Spiegel, Inc., a large mail order company, in violation of 18 U.S.C. §201 (c)(1) and §201(g). The essence of the charges was that appellee, during his tenure as a Senator, accepted bribes in return for influence in the performance of official acts as a Senator and as a member of the Senate Committee on the Post Office and Civil Service with regard to his action, vote, and decision on postal legislation (Jurisdictional Statement pp. 1-2).

In his motion to dismiss, appellee invoked his claim of legislative immunity under the Speech or Debate Clause of the Constitution (Article I, Section 6).[1]

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[1] Appellee's motion also asserted that the indictment improperly and inconsistently charged him as being an aider and abettor of himself; that the charges were unconstitutionally vague; that the underlying statutory provisions, 18 U.S.C. §201(c)(1) and §201(g), were unconstitutionally vague and contained no ascertainable standard. Although the District Court did not pass upon any of these contentions, appellee respectfully reserves the right to brief and argue the same in the event probable jurisdiction is noted.

Prior to the hearing and during argument on the motion, the Government represented that its case depended upon inquiry into the appellee's voting record and committee activities, and disclaimed having any proof of illegal conduct not directly related to such legislative acts. The District Court, in colloquy with Government counsel, expressed the opinion that the Speech or Debate Clause precluded judicial inquiry into the motivations underlying legislative activities, either in prosecution of a Senator "accused of improper motives" or otherwise (Appendix E, *infra* at pp. 27-30).

Contrary to the Government's position on this appeal, nothing decided below construes or invalidates any statute. The District Court plainly held, under the admitted circumstances of this case and in line with *United States v. Johnson*, 383 U.S. 169 (1966), that the Speech or Debate Clause provided the appellee with a complete defense to charges arising out of his legislative acts as a Senator:

> "Gentlemen, *based on the facts of this case, it is admitted by the Government* that the five counts of the indictment which charge Senator Brewster relate to the acceptance of bribes in connection with the performance of a legislative function by a Senator of the United States.
>
> "It is the opinion of this Court that the *immunity* under the Speech and Debate Clause of the Constitution, particularly in view of the interpretation given that Clause by the Supreme Court in *Johnson*, shields Senator Brewster, *constitutionally shields him from any prosecution for alleged bribery to perform a legislative act.*
>
> "I will, therefore, dismiss the odd counts of the indictment, 1, 3, 5, 7, and 9, *as they apply to Senator Brewster.* * * *", (italics added). Appendix A, Jurisdictional Statement.

The order of dismissal entered on November 3, 1970 (Appendix B, Jurisdictional Statement) is based squarely upon the reasons stated in this terse opinion, rather than upon a construction of 18 U.S.C. §201.

On November 4, 1970, the Government noted its direct appeal to this Court (Appendix C, Jurisdictional Statement) under the Criminal Appeals Act, 18 U.S.C. §3731, on the assumption that the decision below was "based upon the invalidity of the statute upon which the indictment is founded." Jurisdictional Statement, p. 2. As an alternative theory of jurisdiction the Government suggested that such decision be viewed as the granting of "a motion in bar." *Id.* p. 3 n. 2.

QUESTIONS PRESENTED

Only two questions are properly before this Court:

Whether the Criminal Appeals Act, 18 U.S.C. §3731, confers jurisdiction over this direct criminal appeal.

Whether the District Court erred in holding the Speech or Debate Clause to constitute a complete defense to a prosecution arising out of a Senator's performance of legislative acts.

On behalf of the appellee it is respectfully submitted that both questions should be answered in the negative.

ARGUMENT

I.

THE CRIMINAL APPEALS ACT, 18 U.S.C. §3731, DOES NOT CONFER JURISDICTION OVER THIS DIRECT CRIMINAL APPEAL.

The Jurisdictional Statement raises — but does not answer — serious questions as to jurisdiction over this direct criminal appeal. Such "appeals by the Government in

criminal cases are something unusual, exceptional, not favored." *Carroll v. United States*, 354 U.S. 394, 400 (1957); see *United States v. Sisson*, 399 U.S. 267, 291 (1970), and authorities cited therein. In view of the difficulties so recently encountered in *Sisson* and posed again this month in *United States v. Weller*, No. 77, this Term, argued December 10, 1970, a two-sentence passing reference is inadequate treatment of the jurisdictional obstacles.

Here the Government invokes two separate provisions of the Criminal Appeals Act, as follows:

> "An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:
>
> "From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded. * * *
>
> "From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy. * * *"

The Criminal Appeals Act keeps alive the "pleading distinctions that existed at common law" between demurrer and special plea in bar. *United States v. Sisson*, 399 U.S. 267, 307 (1970); see *Carroll v. United States*, 354 U.S. 394, 399-406 (1957). Jurisdiction must be found under one category or the other, for "the exceptional right of appeal given to the Government by the Criminal Appeals Act is strictly limited to the instances specified." *United States v. Borden*, 308 U.S. 188, 192 (1939). See *United States v. Sisson*, *supra* at 291. The Government's attempt here to straddle two separate and distinct categories is itself indicative of insecure jurisdictional footing under either.

A. *The decision below was not based upon the invalidity or construction of the statute upon which the indictment was founded.* The District Court dismissed the indictment, but it does not follow that its decision was "based upon the invalidity or construction of the statute upon which the indictment or information is founded." 18 U.S.C. §3731. The label attached to the decision is not determinative of this Court's jurisdiction. *United States v. Sisson*, 399 U.S. 267, 279 n. 7 (1970). The real test is "the effect of the ruling sought to be reviewed." *Ibid; United States v. Hark*, 320 U.S. 531, 536 (1944).

The decision below did not have the effect of sustaining a demurrer upon the construction or invalidity of 18 U.S.C. §201. Unlike *United States v. Spector*, 343 U.S. 169 (1952), and *United States v. Petrillo*, 332 U.S. 1 (1947), the only cases cited in the Jurisdictional Statement on this point, the District Court did not pass on the validity of the underlying statute, much less declare it to be unconstitutionally vague and indefinite. This is manifestly not a case in which the indictment was held bad as a pleading, see *United States v. Borden*, 308 U.S. 188, 193 (1939), or dismissed for failure to charge an offense. Compare, e.g., *United States v. Fabrizio*, 385 U.S. 263 (1966); *United States v. Guest*, 383 U.S. 745 (1966). Nor does the opinion below contain any discussion of 18 U.S.C. §201 or undertake to construe its provisions. Compare, e.g., *United States v. Laub*, 385 U.S. 475 (1967).

As we see it, the District Court avoided questions of construction or invalidity by finding, on the basis of undisputed facts, that the appellee's "immunity under the Speech and Debate Clause * * * constitutionally shields him from any prosecution for alleged bribery to perform a legislative act." Appendix A, Jurisdictional Statement. It seems obvious that the District Court properly viewed

the protection secured by that Clause as a matter of defense, as did this Court in *United States v. Johnson*, 383 U.S. 169 (1966), when it spoke repeatedly of the "legislative privilege" so afforded. *Id.* 178-181. Later decisions reinforce this defensive aspect. The Clause has been described as the source of "legislative immunity" providing its beneficiaries with "a defense on the merits" and protecting them "from the burden of defending themselves." *Powell v. McCormack*, 395 U.S. 486, 502-503, 505 (1969); *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967). The District Court's concept of the Clause as a "constitutional shield", available to this appellee on the facts, plainly eliminated from this case any necessity for a construction of the underlying statute.

On this appeal the Government seeks to argue, as it did below, that the indictment was "founded upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members." Jurisdictional Statement, p. 5, quoting dicta in *United States v. Johnson*, 383 U.S. 169, 185 (1966). It contends here, as it did below, that 18 U.S.C. §201 is "narrowly drawn" and within the power of Congress to enact. An excursion into legislative history is suggested.

What the Government overlooks is that this Court "reviews judgments, not arguments assailing them." *United States v. Shirey*, 359 U.S. 255, 261 n. 5 (1959). Certainly the District Court entertained constitutional challenges to §201 and would have been justified, we submit, in declaring that statute void on its face or as applied. The fact remains, however, that the decision actually rendered was not addressed to the statute as such. To assume or infer that the District Court construed or invalidated §201 is not enough. There must be "an expression of opinion in some form as to manifest clearly whether its act proceeded upon a construction of the statute" before this

Court may assume jurisdiction. *United States v. Carter*, 231 U.S. 492, 494-495 (1913). A direct appeal will not lie where the District Court has considered the construction of the statute but has rested its decision on some other ground. *United States v. Borden*, 308 U.S. 188, 193 (1939). Jurisdiction is limited to those cases where the dismissal is based *solely* upon invalidity or construction of the underlying statute. *United States v. Hastings*, 296 U.S. 188, 194 (1935). For this Court to so characterize the decision below "requires a straining that is not permissible in the light of the principles and history concerning criminal appeals" under 18 U.S.C. §3731. *Carroll v. United States*, 354 U.S. 394, 405 (1957).

B. *The decision below was not one sustaining a motion in bar.* In the alternative, and without much vigor, the Government suggests in a footnote that this Court would have jurisdiction under 18 U.S.C. §3731 "if the District Court's action is viewed as the granting of a 'motion in bar'." Jurisdictional Statement, p. 3, n. 2. The point is not pressed any further. We submit that this appeal does not involve a "motion in bar", particularly in view of the narrow technical meaning associated with that term, although the matter is not completely free from doubt. "The case law under the motion in bar provision is very confused, and this Court has not settled on a general approach to be taken in interpreting this provision." *United States v. Sisson*, 399 U.S. 267, 300 (1970).

The confusion is a result of disagreement over the precise scope of the statutory term, "motion in bar". There appear to be two competing schools of thought. It has been said, on one hand, that modern procedural changes have "swept away the old pleas", including the special plea in bar, and that the test of motion-in-bar jurisdiction is "whether the judgment is one which will end the cause

and exculpate the defendant." *United States v. Mersky*, 361 U.S. 431, 441-442 (1960) (Brennan, J., concurring); *United States v. Hark*, 320 U.S. 531, 536 (1944). See also *United States v. Sisson*, 399 U.S. 267, 326-346 (1970) (White, J., dissenting); *United States v. Blue*, 384 U.S. 251, 254 (1966). Guided by this broad view, the Court has permitted the motion-in-bar provision to reach pleas of constitutional privilege. *United States v. Covington*, 395 U.S. 57, 59 n. 2 (1969); *United States v. Blue*, *supra* at 253-254; *United States v. Murdock*, 284 U.S. 141 (1931). These cases deal with pre-trial assertions of the Fifth Amendment privilege against self-incrimination, and it might be argued that their rationale also embraces claims of "legislative privilege" under the Speech or Debate Clause. The analogy is not warranted, we submit. Confusion enshrouds the motion-in-bar provision, this Court observed recently, and Fifth Amendment cases like *Covington* and *Blue* serve only "to add to the uncertainty", especially if a constitutional privilege "is not appropriately raised by a special plea in bar." *United States v. Sisson*, 399 U.S. 267, 300 n. 33 (1970).

That the motion-in-bar provision should not be expanded to cover a claim of legislative privilege is suggested by *United States v. Sisson*, *supra*, which heralds a return to the fundamental concept "that the Criminal Appeals Act should be construed strictly against the Government's right of appeal." *Id.* 286; see *Will v. United States*, 389 U.S. 90, 96-97 (1967); *United States v. Mersky*, 361 U.S. 431, 454 (1960) (Stewart, J., dissenting); *Carroll v. United States*, 354 U.S. 394, 399-400 (1957). *Sisson* is a reminder that Congress defined jurisdiction in terms of procedures existing in 1907, when it first enacted the Criminal Appeals Act, leaving no room for this Court "to give the statutory language a meaning inconsistent with its common law an-

tecedents," *United States v. Sisson*, *supra* at 297. Because the 1948 amendment to the Act worked no substantive changes by translating the old "special plea in bar" into the contemporary "motion in bar," *id.* 292 n. 22, the former term is necessarily restricted to its narrow common law connotation. *Id.* 300 n. 53, and compare dissenting opinion, *id.* 330 n. 5. See *United States v. Mersky*, *supra*, at 456-458 (Stewart, J., dissenting); *Carroll v. United States*, 354 U.S. 394, 399, 405 (1957); *United States v. Halsey, Stuart*, 296 U.S. 451, 452 (1935). As Mr. Justice Holmes remarked in *United States v. Storrs*, 272 U.S. 652, 654 (1926), the Criminal Appeals Act "uses technical words, 'special plea in bar' and we see no reason for not taking them in their technical sense."

The Solicitor General, in a case argued and pending decision by the Court, likewise takes the position that the scope of the motion-in-bar provision is limited solely to the common law concept of a special plea in bar. See Brief for United States, pp. 14-15, *United States v. Weller*, No. 77, this Term. Upon reflection, that position seems clearly inconsistent with the Government's approach to this appeal.

At common law, a special plea in bar was ordinarily used to raise three defenses — *autrefois aquit*, *autrefois convict*, and pardon. *United States v. Sisson*, 399 U.S. 267, 300 n. 53 (1970); *United States v. Mersky*, 361 U.S. 431, 457 (1960) (Stewart, J., dissenting), and authorities cited therein. To these may be added the defense of limitations. *United States v. Cook*, 17 Wall. 168, 179 (1872). Special pleas were thus strictly reserved for (1) matters of confession and avoidance which (2) occurred *after* the events charged in the indictment and (3) not admissible under the general issue. Conversely, a special plea which met only

part of the indictment was bad. *Moore v. Mississippi*, 21 Wall. 636, 639 (1875). So was a special plea raising matter contemporaneous with the offense charged. See, e.g., *Sorrells v. United States*, 287 U.S. 435, 452 (1932) (entrapment); *State v. Linden*, 154 La. 65, 97 So. 299 (1923) (self-defense). It was also considered improper for a special plea to set up a defense admissible under the plea of not guilty. *United States v. Murdock*, 284 U.S. 141, 150 (1931). "A special plea in bar is appropriate where defendant claims former acquittal, former conviction or pardon but there is no warrant for its use to single out for determination in advance of trial matters of defense either on questions of law or fact." *Id.* 151 (citations omitted).

Judged by these technical common law standards, we submit that a defense under the Speech or Debate Clause is not the functional equivalent of a special plea in bar. The element of confession and avoidance is lacking. The defense is founded upon legislative acts which were contemporaneous with the events alleged in the indictment, not subsequent developments as in the case of former jeopardy, pardon, limitations, and the like. Most significant is that the Clause does not inevitably bar indictment and trial in every case in which it is asserted. Prosecution of a legislator is impermissible under the Clause only when it attempts to "draw into question the legislative acts of the defendant member of Congress or his motives for performing them." *United States v. Johnson*, 383 U.S. 169, 185 (1966). Conversely, the Clause does not necessarily shield conduct "that is in no way related to the due functioning of the legislative process." *Id.* 172. Between these extremes lie abundant shades of gray. Whether the protected activity is merely "an incidental part of the Government's case", *id.* 176, or lies at its very roots are questions of fact determinable under the plea of not guilty.

As the *Johnson* decision holds, a prosecution of a Congressman may run its normal course once it has been "wholly purged of elements offensive to the Speech or Debate Clause." *Id.* 185.

If so, the Criminal Appeals Act is inapplicable because "a motion in bar cannot be granted on the basis of facts which would necessarily be tried with the general issue in the case." *United States v. Sisson*, 399 U.S. 267, 301 (1970). It is true that any trial on the general issue was rendered unnecessary here by the complete absence of any dispute as to the operative facts required for decision. This should not alter the basic rule, however. Jurisdiction should not turn upon the extent to which the facts are undisputed or resolved by Government stipulation, cf., *id.* 284-286, "for this would mean the parties and the lower court simply could foist jurisdiction upon this Court." *Id.* 287. "Appeal rights cannot depend on the facts of a particular case." *Carroll v. United States*, 354 U.S. 394, 405 (1957).

Inasmuch as the motion-in-bar provision is being accorded full treatment in *United States v. Weller*, No. 77, this Term, argued December 10, 1970, we respectfully suggest that consideration of the jurisdictional issues herein should await a decision in that appeal.

II.

THE QUESTION SOUGHT TO BE PRESENTED ON THIS DIRECT APPEAL IS BEYOND THE SCOPE OF THIS COURT'S REVIEW.

In the event that the Court finds that the decision below sustained a motion in bar, it should decline to entertain the argument advanced in the Jurisdictional Statement, pp. 5-6, to the effect that the federal bribery statute, 18 U.S.C. §201, is "a narrowly drawn statute passed by Con-

gress in the exercise of its legislative power to regulate the conduct of its members." *United States v. Johnson*, 383 U.S. 169, 185 (1966).

It is undeniable that *Johnson* left open the "narrowly drawn statute" question for future consideration in a proper case. But that question, entailing statutory interpretation and analysis of legislative intent, is beyond the narrow scope of review permitted by the Criminal Appeals Act. "The Government's appeal does not open the whole case." *United States v. Borden*, 308 U.S. 188, 193 (1939); *United States v. Keitel*, 211 U.S. 370, 398 (1908). The Criminal Appeals Act vests "this Court with jurisdiction only to review the particular question decided by the Court below for which the statute provides." *United States v. Keitel*, *supra*. Any issue dealing with the validity or construction of the statute underlying the indictment is wholly beyond the scope of an appeal of a judgment sustaining a motion in bar. *United States v. Kissel*, 218 U.S. 601, 604 (1910); *United States v. Mason*, 213 U.S. 115 (1909). See Stern & Gressman, *Supreme Court Practice* 43 (4th ed. 1969).

Accordingly, this Court's jurisdiction (assuming its existence) extends only to the specific question whether the shield of the Speech or Debate Clause precluded judicial inquiry into the appellee's legislative acts. Cf., *United States v. Mason*, *supra*.

III.

THE QUESTION SOUGHT TO BE PRESENTED ON THIS DIRECT APPEAL WAS NOT EXPRESSLY PASSED ON BELOW AND IS NOT RIPE FOR REVIEW BY THIS COURT.

Even if there are no jurisdictional obstacles to full review of the federal bribery statute, 18 U.S.C. §201, in the light of the "narrowly drawn statute" question posed in

United States v. Johnson, 383 U.S. 169, 185 (1966), the Court should abstain from considering such issues for the reason that they were not decided below. In essence, the Government is asking this Court in the first instance to review the legislative history, construe the statute, and measure its scope and refinements, despite any expressions of legal judgment by the District Court, and then to declare whether or not Congress has the constitutional power to enact the statute thus construed — again without benefit of a District Court opinion. We cannot regard this as other than a request for an abstract opinion upon the constitutionality of an act of Congress. See *United States v. Carter*, 231 U.S. 492, 493-494 (1913).

Even in cases "confessedly within its jurisdiction", this Court will not pass upon the constitutionality of legislation unless absolutely necessary to a decision of the case or unless the record presents no other ground upon which the case may be disposed of. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 345-346 (1936) (Brandeis, J., concurring). In *United Public Workers of America v Mitchell*, 330 U.S. 75, 89-90 (1947), the Court said:

> "The power of courts, and ultimately of this Court to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough."

Where jurisdiction is rigidly circumscribed by the Criminal Appeals Act, as here, it should not be exerted to answer delicate questions as to the construction or validity of Congressional enactments where such questions were not expressly decided below and the case was properly disposed of on some other ground. Regarding the present appeal, "it suffices to say that instances of similar un-

clarity under the Criminal Appeals Act counsels the wisdom of abstaining from reviewing construction of a criminal statute on so cloudy a record as is now before the Court." *United States v. Fruehauf*, 365 U.S. 146, 158 (1961).

IV.

THE DECISION BELOW RAISES NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT.

On the merits, and putting to one side all jurisdictional problems, this appeal gives rise to a single question: whether the Speech or Debate Clause provides a Senator with a complete defense to a criminal prosecution inquiring into his votes upon pending legislation. We submit that this question was answered in *United States v. Johnson*, 383 U.S. 169 (1966), the controlling principles of which were correctly applied below. Indeed, apart from the "narrowly drawn statute" issue, the Government points out no distinction between this case and *Johnson* and we believe none can be drawn. Consequently, if jurisdiction is found to exist, the decision below should be affirmed summarily on the authority of *Johnson* without further briefing or argument.

Johnson involved a conspiratorial attempt to exert influence on the Department of Justice to obtain the dismissal of mail fraud indictments pending against officers of a savings and loan company. As *a part* of the general scheme to influence the Department, Congressman Johnson was charged with accepting payments in return for making a speech on the floor of the House of Representatives. Although the Government did not proceed under the federal bribery statute, as it did here, it sought to prove that the payments "were made simply to 'buy' the Congressman." *Id.* 383 U.S. at 172.

At trial the bulk of the evidence dealt with Johnson's financial transactions with other conspirators and with his contacts with the Department. But there was also evidence as to the speech and his motives for giving it, thus inviting the sort of inquiry proscribed by the Speech or Debate Clause.

> "The constitutional infirmity infecting this prosecution is not merely a matter of the introduction of inadmissible evidence. The attention given to the speech's substance and motivation was not an incidental part of the Government's case, which might have been avoided by omitting certain lines of questioning or excluding certain evidence. The conspiracy theory depended upon a showing that the speech was made solely or primarily to serve private interests, and that Johnson in making it was not acting in good faith, that is, that he did not prepare or deliver the speech in the way an ordinary Congressman prepares or delivers an ordinary speech." *Id.* 176-177.

Reviewing the Clause in historical perspective, and in the light of its two prior encounters with it,[2] this Court concluded "that the legislative privilege will be read broadly" and will not be destroyed by a "claim of an unworthy purpose." *Id.* 180. Thus Johnson's conduct in giving the speech, however reprehensible because motivated by renumeration from private sources, was within the scope of the privilege. *Ibid.* The accusation that the speech "was improperly motivated * * * is precisely what the Speech or Debate Clause generally forecloses from executive and judicial inquiry." *Ibid.*

It is true that the Court in *Johnson* limited its holding to the specific facts before it, as follows:

> "We hold that a prosecution under a general criminal statute dependent upon such inquiries necessarily

[2] *Tenney v. Brandhove*, 341 U.S. 367 (1951); *Kilbourn v. Thompson*, 103 U.S. 168 (1880).

contravenes the Speech or Debate Clause. We emphasize that our holding is limited to prosecutions involving circumstances such as those presented in the case before us. Our decision does not touch a prosecution which, though as here founded on a criminal statute of general application, does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them. And, without intimating any view thereon, we expressly leave open for consideration when the case arises a prosecution which, though possibly entailing inquiry into legislative acts or motivations, is founded upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members." *Id.* 184-185.

However, even if *Johnson* is considered a "limited holding", *id.* 186 (Warren, C.J., concurring), the decision below did not go beyond its precepts. Although the appellee's prosecution has a different statutory genesis, it is conceptually on all fours with *Johnson*. Here again is a member charged with accepting alleged payments in return for being influenced in the performance of legislative acts. Whereas *Johnson* involved a bribe-induced speech, the present case is grounded upon votes in the Senate and in Committee upon pending legislation. Under his plea of not guilty, the appellee's motives in considering such legislation and voting thereon were placed in issue and would have been subjected to judicial examination had not the District Court applied the *Johnson* rationale to voting as well as speech-making.

On the latter point there can be no doubt. As this Court said recently, the Speech or Debate Clause is not confined to words spoken in debate. "Committee reports, resolutions, and *the act of voting are equally covered*, as are things generally done in a session of the House by one of

its members in relation to the business before it'." *Powell v. McCormack*, 395 U.S. 486, 502 (1969) (italics added).

Nor is this case an appropriate vehicle for resolving whether the federal bribery statute, 18 U.S.C. §201, is a "general criminal statute" or whether it is instead "a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members." *United States v. Johnson*, 383 U.S. 169, 185 (1966). We find no warrant in this *Johnson* dicta for a supposition that Congress, by enactment of a "narrowly drawn statute", may carve out an exception to the Speech or Debate Clause so as to expose a Congressman's voting habits to judicial scrutiny and criminal sanctions. *Johnson* itself indicates that the legislative privilege was born of a desire "to prevent intimidation by the executive and accountability before a possibly hostile judiciary." *Id.* 181. *Powell v. McCormack*, 395 U.S. 486, 502 (1969). The very purpose of the privilege confines it to legislative activity. Within that limitation, the privilege should be regarded as absolute. This would seem to be the very essence of the Court's post-*Johnson* pronouncements:

> "It is the purpose and office of the doctrine of legislative immunity, having its roots as it does in the speech and debate clause of the Constitution, that legislators engaged in the sphere of legitimate legislative activity should be protected not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (citations omitted).
>
> "Our cases make it clear that the legislative *immunity* created by the Speech or Debate Clause performs an important function in representative government. It *insures* that legislators are free to represent the interests of their constituents *without fear that they will be later called to task in the courts for that repre-*

sentation." *Powell v. McCormack*, 395 U.S. 486, 503 (1969) (italics added).

We fail to appreciate the need for further clarification.

Moreover, the interrelation between federal bribery prosecutions of Congressmen and the Speech or Debate Clause hardly presents a novel question for this Court. *Johnson* itself was a "speech for compensation" case, *id.* 383 U.S. at 171, in which payments "were made simply to 'buy' the Congressman." *Id.* 172.[3] In oral argument in *Johnson* the Government dealt with the case in terms of Congressional power "to make it a crime triable in court for a Congressman to take money to make a speech." *Id.* 186 n. 16. In reply to the Government contention that the Speech or Debate Clause does not cover prosecutions founded on "the antecedent unlawful conduct of accepting or agreeing to accept a bribe," *id.* 182, this Court reminded the Government that "the language of the Constitution is framed in the broadest terms", *id.* 182-183, and quoted the statement in an English case[4] "that the motives or intentions of members of either House cannot be inquired into by criminal proceedings with respect to anything they may do or say in the House." *Id.* 183.[5] No further reminders to the Government should be necessary here.

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[3] Chief Judge Sobeloff, comparing the conspiracy charge against Congressman Johnson with the federal bribery statute, noted "the close relation between the two." *United States v. Johnson*, 337 F. 2d 180, 189 (4th Cir. 1964), aff'd 383 U.S. 169 (1966).

[4] *Ex parte Wason*, 4 Q.B. 573, 576 (1869) (Lush, J.).

[5] To a like effect is *Coffin v. Coffin*, 4 Mass. 1, 27 (1808), wherein the Court, similarly spoke of an absolute privilege admitting of "no exceptions;

> "I will not confine it to delivering of an opinion, uttering a speech, or haranguing in debate; but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature, and in the execution, of the office; and I would define the article, as securing to every member exemption from prosecution, for everything done or said by him, as

The shield of a Congressman's voting habits from outside inquiry "is one manifestation of the 'practical security' for insuring the independence of the legislature." *United States v. Johnson*, 383 U.S. 169, 179 (1966). The political process makes it inappropriate for the judicial and executive branches to pass upon the motives of legislators. Unlike judges and administrative officials, Congressmen are frequent recipients of donations from a variety of sources. They must obviously look to contributors for financial support. Votes favorable to past and potential supporters are inevitable. Given the accepted definition of bribery — payment to influence action — and the susceptibility of Congressmen to allegations of being influenced by financial donors, the Speech or Debate Clause extends an impenetrable constitutional shield from prosecution to Congressmen engaged "in the sphere of legitimate legislative activity." *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951).

> "In times of political passion, dishonest or vindictive motives are readily attributed to conduct and as readily believed. Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses." *Id.* 378.

Few provisions of our Constitution are as sparsely litigated as the Speech or Debate Clause. *United States v.*

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a representative, in the exercise of the functions of that office; without inquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules." *Coffin* is said to be "the most authoritative case in the country on the construction of the provision in regard to freedom of debate in legislative bodies, and being so early after the formation of the Federal Constitution, is of much weight." *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881). It was more recently cited with approval in *Tenney v. Brandhove*, 341 U.S. 367, 373 (1951), and in Judge Sobeloff's opinion in *United States v. Johnson*, 337 F. 2d 180, 188, 190 (4th Cir. 1964), aff'd 383 U.S. 169 (1966).

Johnson, 383 U.S. 169, 179 (1966). And yet, in the five years since *Johnson*, it has twice been the subject of thoroughgoing consideration. See *Powell v. McCormack*, 395 U.S. 486 (1969); *Dombrowski v. Eastland*, 387 U.S. 82 (1967). Now the Government seeks to bring up the Clause for a fourth reading in a situation differing little from *Johnson*. We do not believe such a new reading to be necessary.

V.

THE QUESTION SOUGHT TO BE PRESENTED ON THIS APPEAL IS SO INSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

We now turn to the issue which the Government urges upon this Court, i.e., whether the Speech or Debate Clause bars a prosecution of a Senator "founded upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members." *United States v. Johnson*, 383 U.S. 169, 185 (1966). The question was left open in *Johnson* "for consideration when the case arises", *ibid.* According to the Government, this prosecution under the federal bribery statute, 18 U.S.C. §201, presents the issue left undecided in *Johnson*. It argues that Congress may constitutionally enact a statute providing for judicial sanctions against a member who accepts a bribe for performance of a legislative act; that §201 reflects a proper exercise of such assumed constitutional power; that the statute should be construed to authorize prosecutions of Congressmen thereunder free from the constraints imposed by the Speech or Debate Clause. Jurisdictional Statement, pp. 5-6.

Without minimizing the abstract importance of the question posed in *Johnson*, we maintain that this is not an appropriate occasion for deciding it. As discussed herein, *supra* at pp. 6-8, 12-15, the decision below was not based on

the invalidity or construction of §201 and, in any event, did not rule on the Government's contentions. Thus abstention by this Court, we submit, is both necessary and desirable. Should this Court find both the jurisdiction and the inclination to pursue such contentions, however, it will find them devoid of substance in the context of this appeal.

The Government's position necessarily assumes §201 to be a "narrowly drawn statute" within the contemplation of *Johnson*. Because the position falls with its initial premise, there is no present need to deal with such intriguing but presently irrelevant issues as the power of Congress to regulate the conduct of its members; the delegability of such power to the courts; the extent to which a member's voting habits may be subjected to outside scrutiny without running afoul of the Clause; the construction of §201 as an exception to the Clause; the constitutionality of §201 as thus construed.

Although *Johnson* does not define what is meant by "a narrowly drawn statute", the unmistakable connotation is one of precision. The footnote reference (*id.* 185 n. 15) to pages 347-348 of the Note, *The Bribed Congressman's Immunity From Prosecution*, 75 YALE L.J. 335 (1965), confirms this impression. When the Court posed the "narrowly drawn statute" question as a possible alternative to an absolute prohibition on bribery prosecutions, it evidently had the following passage in mind:

> "The possibility of a tight definition of bribery which would *sharply reduce discretion afforded under existing statutes* indicates that there need not be an absolute immunity to bribery prosecutions." *Ibid.* (italics added).

Without pausing to contest the notion that Congress can impair the constitutional privilege of its members by tight

definitions of bribery, we reject as unfounded any suggestion that §201 is defined with such precision as to qualify as a "narrowly drawn statute". It should be noted that "existing statutes" were not placed within the acceptable category. For example, the Note condemned a companion statute, 18 U.S.C. §203, punishing conflicts of interest, as constitutionally vague for reasons equally applicable to §201.

> "[It] allows conviction for an agreement to receive compensation even when the bribed service has not been performed and even when consideration has not passed. Thus the statute leaves the jury free to convict essentially upon evidence of intent only. Standards of proof of intent are rather uncertain, and a Congressman might fear legitimately that honest conduct could be misinterpreted. Every conversation with a constituent interested in having his Congressman support legislation or urge change in executive policy could be suspect." *Id.* 347.

Turning to §201 itself, the Note declared that its provisions "present vagueness problems similar to those encountered under the conflict of interest provision." *Id.* 347 n. 76.

It is obvious that neither the Note nor *Johnson* contemplated §201 as a "narrowly drawn statute". Congress was invited to enact new legislation containing a "tight definition of bribery" so as to overcome vagueness problems depicted in the Note. Congress has not yet responded and §201 remains on the books as a wide-ranging "general criminal statute", *United States v. Johnson*, 383 U.S. 169, 185 (1966).

Historically, the federal bribery statute has been construed "in the broadest possible manner." *United States v. Glaser*, 129 F. Supp. 285, 286 (D. Del. 1955). See also

Parks v. United States, 355 F. 2d 167, 168 (5th Cir. 1965). Neither receipt of compensation nor performance of actual services appear essential to conviction thereunder. See e.g., *United States v. Kemmel*, 188 F. Supp. 736 (M.D. Pa. 1960), aff'd 295 F. 2d 712 (3rd Cir. 1961), cert. denied 368 U.S. 988 (1962). It is the very antithesis of a "narrowly drawn statute".

> "If this statute be viewed solely from the standpoint of grammar and phraseology, it is quite striking how many broadening words are used in the statute: 'in *any* official capacity,' '*any* department or agency,' 'on *any* question, matter, cause, or proceeding', which may *at any time* be pending, 'which *may* by law be brought before him.' Consider the number of disjunctive or alternative persons, actions, or situations referred to: 'an officer *or* employee of, *or* person acting for or on behalf of the United States', 'any department *or* agency,' 'decision *or* action', 'any question, department or agency', 'decision *or* action', 'any question, matter, cause, *or proceeding* which may at any time be pending, or which may by law be brought before him,' 'in his official capacity, *or* in his place of trust *or* profit.' There is no verbal requirement that the matter be pending before the official at the time of the bribe. It is sufficient if it 'may *at any time* be pending', or if it '*may* by law be brought before him' at some time in the future.
>
> "Certainly, in the face of such sweeping language and the purpose it was designed to accomplish, we find no reason to find any intent on the part of Congress that the statute must be narrowly construed, to exclude any person or any conduct fairly within the broad statutory ambit. To this statute, (and its companion, 18 U.S.C.A. §201), the federal courts have properly given an extremely liberal interpretation." *Wilson v. United States*, 230 F. 2d 521, 524 (4th Cir.), cert. denied 351 U.S. 931 (1956) (italics in original).

When §201 was enacted as part of the 1962 revision, it did not restrict the broad sweep of these interpretations:

"The bill does not limit in any way the broad interpretation that the courts have given to the bribery statutes; rather, the intent is to insure that this broad interpretation shall be given universal application." House Rep. 748, Comm. on the Judiciary, 87th Cong., Ist Sess. 17 (1961).

A reading of §201, its definitions and substantive language, and its interpretation by the federal courts readily negates any supposition that it can be viewed as "narrowly drawn" under any reasonable definition. Nor can we believe that Congress meant by enacting §201 to restrict the traditional freedom of Congressmen acting within their sphere of legislative activity. Cf., *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). Reliance by the Government upon a general criminal statute so lacking in specificity and so susceptible of unconstitutional application, with a consequent chilling effect upon legislative speech and debate, underlines the insubstantial nature of this appeal and counsels its summary dismissal.

CONCLUSION

For the foregoing reasons, we respectfully submit that the appeal should be dismissed or, in the alternative, that the judgment of the District Court be affirmed. We further suggest that consideration of the jurisdictional issues discussed herein be postponed pending decision of *United States v. Weller*, No. 77, this Term.

Respectfully submitted.

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December, 1970.

APPENDIX E

Extract from the Transcript of Proceedings in United States of America v. Daniel B. Brewster, Criminal No. 1872-69, United States District Court for the District of Columbia, Before the Honorable George L. Hart, United States District Judge October 9, 1970, pages 29-33.

* * * * * *

(29) (The Court) You know, to me an interpretation of the law is supposed to be common sense and all these nice differentiations sometimes escape me.

But we have the Constitution, which in the Speech and Debate Clause definitely intends to protect Senators and Congressmen from being questioned as to why as a Senator or a Congressman they voted a certain way, made a certain speech in the Congress or voted a certain way in Committee, or I should think it might certainly extend to arguing with other Senators why they should vote for their point of view and whatnot.

Now, surely the framers wished to protect these members from being constantly heckled and accused of improper motives, certainly as far as the criminal law is concerned, for what they did.

Now, if that is the purpose of it aren't we in (30) this case, in effect, or isn't the Government in this case, in effect, questioning Senator Brewster for his legislative actions in committee and on the floor? That is what I am having trouble getting around.

Now, there are some circumstances that maybe it is impossible to stop Representatives and Senators from being rascals. I am not speaking of Senator Brewster, nothing so far has been proven against him, I am speaking generally. Except, of course, the will of the people, which is the final judge in these cases.

I don't know, but I must admit this thing gives me a lot of trouble and seeing the trouble I am in, what can you do to cast some light in my mind?

(Mr. Baron) [Government Counsel] Your Honor, I submit this: I don't want to pretend it is a clearcut question. It is terribly troublesome and it is one the Supreme Court didn't reach in Johnson. Obviously they left it open for you to struggle with or for Judge Thomsen to struggle with in Maryland.

I submit that if all we had were the Speech and Debate Clause in the Constitution, if there were no section 201 passed by the Congress, the very body which has the right to claim the privilege under the Speech and Debate Clause—

(The Court) Congress can't change the Speech and Debate Clause except by submitting a Constitutional Amendment.

(31) (Mr. Baron) I submit, Your Honor, they have the power, however, to regulate their own membership and we submit they have the power to delegate the power to regulate their own membership.

And that if there were no Section 201 or its equivalent, I would say that we are stymied, it is a license to steal. But Congress having exercised that power, Congress having, in effect, said to the Judiciary and to the Executive you have the authority by virtue of our legislation to investigate, to try Congressmen who may be guilty of corrupt activities, I submit that 201 is the mandate for proceeding.

(The Court) We are now just talking about corrupt activity in your legislative capacity. I wouldn't have any trouble with the allegations of the Dowdy matter as to accepting money to try to affect the Executive Branch of the Government or the Judicial, should such a thing happen. But I must admit I am having trouble with whether Congress itself has the power.

If Congress does not have the power they can't give it to us.

Does Congress itself have the power to question why a man voted a certain way, why he argued a certain way,

why he made the representations he made in executive committee and whatnot, does Congress itself have that power?

It isn't enough just to say that Congress has given (32) it to the courts. Have they got it to give?

(Mr. Baron) Your Honor, I submit that they do. I think that Powell certainly reflects that, whatever else Powell may say, which probably raises more questions than it answers. I think Powell does reflect that they do have the right to discipline their members and to regulate the conduct of their members and I submit—

(The Court) They have got a right to regulate certain conduct of a member and of course under one section of the Constitution, by a two-third vote, presumably subject to Supreme Court opinion, they have a right to remove a man from the Senate almost without giving any cause; but that could be done without questioning the manner in which he voted or manner in which he spoke or the manner in which he acted in his purely legislative capacity.

This thing gives me a lot of trouble.

(Mr. Baron) Your Honor, I would not begin to pretend it is not a troublesome point. It is one which I assume some day the Supreme Court is going to resolve for us, more or less.

But I do submit, Your Honor, that Congress does have this inherent power to inquire, yes, even into the integrity of its own process, and it does have the power to delegate that should the Congress determine in its wisdom that (33) it, as a body, is simply not capable of performing that function which it has inherent the power to perform. They have the power to delegate that to the most appropriate forum of all, the Federal Judiciary. And should it be abused by the Federal Judiciary, Congress can revoke that power.

(The Court) That is not the question. The question becomes simple. Does Congress itself have the power to question the speech and debate of one of its members with the

necessary legislative matters that go along with it? If it has, it can give it to the courts. If it doesn't, it can't give what it doesn't have.

Well, tell me this: does the indictment in any wise allege that Brewster did anything not related to his purely legislative functions?

(Mr. Baron) We are not contending that what is being charged here, that is, the activity by Brewster, was anything other than a legislative act. We are not ducking the question; it is squarely presented. They are legislative acts. We are not going to quibble over that.

* * * * * * *